Constitutional Provisions Applicable to Municipal and Justice Courts

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I. INTRODUCTION

Understanding Constitutional law is impossible without first studying how the framers set up the distribution and exercise of government power and the rights of individuals as set forth in the original 1787 draft of the federal Constitution. The system was designed to be a constant power struggle between the three co-equal branches of government, the judicial, the executive and the legislative. This is outline will briefly review the separation of powers between the branches, and the relationship between the federal and state governments. It will conclude with the powerful provisions guaranteeing due process and individuals liberties.

II. THE STRUCTURE OF THE UNITED STATES CONSTITUTION

A. A constitution is a nation's basic law. The constitution contains the basic principles by which the nation is governed. In the U.S. Constitution, Article VI, Clause 2 states that the Constitution is the "supreme law of the land." It both authorizes and limits governmental power.

B. The 1789 Constitution contained seven articles. The articles established a powerful, but limited national government and rules for the individual states.

C. The Bill of Rights (the first 10 amendments) were proposed as a package in 1789 by the first Congress to meet under the new Constitution. These first ten amendments established important individual rights and declare two important principles about how the Constitution works.

D. The Post-Civil War amendments (the 13th, 14th, and 15th amendments) abolished slavery and established rights for newly freed slaves.

E. The 17th, 19th, 23rd, 24th, and 26th amendments expanded voting rights.

Constitutional law involves interpretation. That is where the judicial branch comes into play.

III. FEDERALISM

The federal system allocates power between the national and state governments. The Constitution seeks to preserve a fine balance of federal vs. state power. To curb the ability of the new national government to abuse its powers, the framers limited the new federal government to enumerated (expressly specified) powers. The framers did not intend the federal government to be like state governments, which retained general "police powers" to promote the health, safety, morals, and welfare of their citizens through any law not prohibited in their own constitutions or the national one.

A. Under the Constitutional, the national government is limited to enumerated powers, as well as those means "necessary and proper" to fulfill those powers. The 10th Amendment states that "The powers not delegated to the United States by the Constitution ....are reserved to the States respectively, or to the people."

B. Federal government supremacy. The Article IV supremacy clause allows federal laws and regulations and the treaties the federal government enters into with foreign countries to preempt contrary state constitutions, laws, or other policies. State laws not inconsistent with federal laws are allowed.

C. Federal Law. State officials may help enforce federal laws but the Constitution limits the ability of the federal government to require that they do so. Based upon the Supremacy Clause, state officials are obligated to follow and obey federal law and to apply it instead of conflicting state law. In addition, ***Testa v. Katt***, 330 U.S. 386 (1947), held that Congress could require state courts to hear federal cases and to enforce federal law.

D. Preemption. States retain plenary power to make laws covering anything not preempted by federal law. Normally, state supreme courts are the final interpreters of state constitutions and state law, unless their interpretation itself presents a federal issue, in which case a decision may be appealed to the U.S. Supreme Court by way of a petition for writ of certiorari. States may grant their citizens broader rights than the federal Constitution as long as they do not infringe on any federal constitutional rights. See ***Cooper v. California***, 386 U.S. 58, 62 (1967) (higher state standards for searches).

IV. FEDERAL DUE PROCESS

The 5th and 14th Amendments to the Constitution provide citizens with specific procedural and substantive due process rights. Procedural due process rights include a specific process when one's liberty, or freedom, is at stake. Substantive due process, sometimes referred to as Fundamental Due Process, is not specifically set forth in the text of the Constitution and is left to the Supreme Court to interpret. Although the due process command is used in many different applications, at its core, it prohibits arbitrary governmental action.

A. Procedural Due Process. This essentially challenges the ***way*** government deprives people of liberty or property. A challenger claiming that a law or policy violates procedural due process is not challenging government's ultimate power to do so, but is saying that the government cannot deprive him of liberty or property without affording him better procedure than it has. In ***Goldberg v. Kelly***, 397 U.S. 254 (1970), welfare recipients challenged the procedures used by New York City to revoke benefits. The recipients had a legitimate property right to due process because a New York statute gave poor people who met eligibility requirements a "legitimate entitlement" to welfare benefits. The Court held that before benefits could be revoked, the city had to provide a more-detailed notice and hearing procedures. They were not disputing the city could revoke the benefits, only the manner in which it did so.

B. Substantive Due Process. This challenges the government's basic ***ability*** to deprive those rights. The challenger is saying that government doesn't have an adequate basis for the deprivation (and thus can't take life, liberty or property) – *regardless of how good the procedures* are that it uses in doing so. In ***Griswold v. Connecticut***, 381 U.S. 479 (1965), challengers argued that a Connecticut law criminalizing the use of contraceptives, even by married people, denied their right to privacy. The challengers were not arguing the state could deny access if they only followed better procedures. The challengers alleged the state (and the Court agreed) overstepped its power by arbitrarily depriving married persons of their substantive right to contraceptive, regardless of the procedure used.

C. Individual Liberty. The due process clause of the 5th and 14th amendments are important in protecting liberty interests in four ways:

1) They require procedural protections for criminal defendants
2) They mandate procedures before governments deprive individuals of liberty
3) They set ultimate limits on government's power to restrict liberty
4) They apply the Bill of Rights to state and local governments

D. Incorporation. Incorporation addresses the issue of whether the 14th Amendment incorporates the protections of the Bill of Rights to make them applicable against the states. Before the adoption of the 14th Amendment in 1868, the Supreme Court held in ***Barron v. Mayor of Baltimore***, 32 U.S. 243 (1833), that the protections found in the Bill of Rights were not applicable against the states. However, by the mid-20th Century, most of the provisions of the Bill of Rights had been applied or incorporated by the Court against the states. In fact, the Court has incorporated most of the protections of the Bill of Rights, namely the First, Second, Fourth, Fifth, Sixth, and Eighth Amendments, except the Sixth Amendment right to indictment by a grand jury, the Seventh Amendment right to civil jury trial, and the Eighth Amendment protection against excessive bail. It also has not applied to the states the Third Amendment right not to have soldiers quartered in one's home.

V. FEDERAL CRIMINAL PROCEDURE

The first 8 amendments to the Constitution apply by their terms only to the federal government. However, as stated above, the Supreme Court has incorporated many of these rights into the due process requirement binding on the states by virtue of the 14th Amendment. Those portions of the Bill of Rights "fundamental to our concept of ordered liberty" have been so incorporated. ***Duncan v. Louisiana***, 391 U.S. 145 (1968).

A. The Fourth Amendment.

1) Reasonableness clause: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated,"

(a) A search can be defined as a governmental intrusion into an area where a

person has a reasonable expectation of privacy.

(b) A seizure can be defined as the exercise of control by the government over a person or thing.

(c) What is reasonable under the 4th Amendment depends on the circumstance.

2) Warrants clause: "...and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to searched, and the person or things to be seized."

3) Standing. Fourth Amendment rights may only be asserted by one who is subjected to an unreasonable search or seizure. Thus, a defendant cannot challenge a search against a co-defendant. The 4th Amendment only applies to actions by the government, or agents of government. See ***Rakas v. Illinois***, 439 U.S. 128 (1978)

4) For Fourth Amendment purposes, "person" includes:

(a) the defendant's body as a whole (as when he is arrested);
(b) the exterior of the defendant's body, including his clothing (as when he is patted down for weapons);
(c) the interior of the defendant's body (as when his blood or urine is tested for drugs or alcohol);
(d) the defendant's oral communications (as when his conversations are subjected to electronic surveillance).

5) "House" has been broadly construed to include:

(a) structures used as residences, including those used on a temporary basis, such as a hotel room;
(b) buildings attached to the residence, such as a garage;
(c) buildings not physically attached to a residence that nevertheless are used for intimate activities of the home, e.g., a shed;

(d) the curtilage of the home, which is the land immediately surrounding and associated with the home, such as a backyard. However, unoccupied and undeveloped property beyond the curtilage of a home ("open fields") falls outside of the Fourth Amendment.

Commercial buildings receive limited Fourth Amendment protection on the theory that one has a greater expectation of privacy in his home than in commercial structures.

6) Reasonable Expectation of Privacy. In ***Katz v. United States***, 389 U.S. 347 (1967), the Court adopted a new standard to determine whether or not there was an actual search. Did the defendant have a "reasonable expectation of privacy." Police had placed a listening device in a public phone booth Katz regularly used. Applying this new standard, the Court found that despite the fact that the telephone booth was made of glass and the defendant's physical actions were knowingly exposed to the public, what he sought to protect from the public were his conversations, as evidenced in part by shutting the door to the phone booth. Thus, the government's electronic surveillance of the defendant's conversations without a warrant violated the Fourth Amendment. ***Katz*** developed a two-prong test:

(a) defendant must have exhibited an actual (subjective) expectation of privacy
(b) society must recognize that expectation as reasonable

7) The Supreme Court has found no expectation of privacy in objects held out to the public, such as one's voice, handwriting, or the smell of one's luggage. However squeezing luggage is a search. ***Bond v. United States***, 529 U.S. 334 (2000). Dog sniffs are not a search, nor are views of your property by aerial surveillance. However, absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures. ***Rodriguez v. United States***, 135 S.Ct. 1609, 1612 (April 20, 2015).

8) Modern Technology. ***United States v. Jones***, 132 S. Ct. 945 (2012). The government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth

Amendment. The majority found placing the device on the car was a trespass. ***Kyllo v. United States***, 533 U.S. 27 (2001), held that the use of a thermal imaging device from a public vantage point to monitor the radiation of heat from a person's home was a "search" within the meaning of the Fourth Amendment, and thus required a warrant. Police were trying to determine if defendant was using heat lamps to grow marijuana. In ***Riley v. California***, 134 S.Ct. 2473 (June 25, 2014), the Supreme Court unanimously held that police may not search an arrested individual's cell phone data without a warrant.

9) The Warrant Requirement. Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable unless an exception applies. This allows a neutral and detached magistrate to consider whether there is probable cause to search instead of the law enforcement officer actively investigating the case.

10) Exceptions to Warrant Requirement.

(a) Consent

(b) Search Incident to Lawful Arrest. Officers can also search the defendant's "wingspan" for their own safety. ***Chimel v. California***, 395 U.S. 752 (1969).

(c) Plain View

(d) Stop & Frisk investigatory detentions. ***Terry v. Ohio***, 392 U.S. 1 (1968).

(e) Automobile Exception. Because they are mobile, police can search without a warrant if they have probable cause. ***Carroll v. United States***, 267 U.S. 132 (1925).

(f) Inventory searches

(g) Emergencies/Hot Pursuit (a/k/a Exigent Circumstances)

(h) Administrative inspections of homes or business need a warrant, with the exception of the seizure of contaminated food or highly

regulated industries, such as liquor stores and gun shops.

(i) Airline passengers.

(j) School searches

(k) Probationers' home

(l) Government employees' desks and files

(m) Border searches

11) Roadblocks. To be valid, roadblocks must (1) stop cars on the basis of some neutral articulable standard (like every third car), (2) be designed to and serve purposes closely related to a particular problem related to automobiles and their mobility (sobriety checkpoints). ***Indianapolis v. Edmond***, 531 U.S. 32 (2000).

12) Probable Cause. The best definition is simply "a reasonable belief that a person has committed a crime". Probable cause must exist for a law enforcement officer to make an arrest without a warrant, search without a warrant, or seize property in the belief the items were evidence of a crime. Courts look at the "totality of the circumstances" to determine if probable cause exists. ***Illinois v. Gates***, 462 U.S. 213 (1983). This is a higher standard than reasonable suspicion as defined in ***United States v. Cortez***, 449 U.S. 411 (1981). Officers must have a particularized and objective basis for suspecting a person of criminal activity to stop them (***Terry*** stop) to further investigate.

13) The Exclusionary Rule. Evidence collected in violation of the Constitution will be excluded from evidence. This is a judge-made doctrine that is not in the 4th Amendment. The rule includes evidence later obtained based on illegally obtained evidence or "fruit of the poisonous tree. ***Wong Sun v. United States***, 371 U.S. 471 (1963). The exclusion of evidence is a very strong deterrent to police misconduct. The courts should not sanction the use of illegal obtained evidence. In ***Mapp v. Ohio***, 367 U.S. 643 (1961), the Court held illegally obtained evidence could not be used in state or federal court. There are a few exceptions to this rule:

(a) Use as impeachment

(b) Good faith (***United States v. Leon***, 468 U.S. 897 (1984))
(c) Use at grand jury
(d) Inevitable discovery
(e) Can be used in civil proceedings
(f) Can be used in revocation hearings

14) Arrests. An arrest must be based on probable cause. An officer must have, at the time of the arrest, knowledge of reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect has committed or is committing a crime. ***Beck v. Ohio***, 379 U.S. 89 (1964).

15) Public Places. Different from searches, police do not generally need to obtain a warrant before arresting a person in a public place, even if they have time to get a warrant. ***United States v. Watson***, 423 U.S. 411 (1976). Police may arrest a person without a warrant when they have reasonable grounds to believe that a felony has been committed and that the suspect committed it. An officer may make a warrantless arrest for a misdemeanor *committed in his presence*. However, police must have a warrant to make a nonemergency arrest of a person inside a home. ***Payton v. New York***, 445 U.S. 573 (1980).

16) Recent 4th Amendment cases. ***Rodriguez v. United States***, 135 S.Ct. 1609 (2015) (once a traffic stop is completed, a dog sniff is unreasonable without additional reasonable suspicion). ***Heien v North Carolina***, 135 S.Ct. 530 (2014) (a stop initiated by an Officer's reasonable mistake of law is not a violation of the 4th Amendment). ***Navarette v. California,*** 134 S.Ct. 1683 (2014) (an anonymous call can provide officers with reasonable suspicion to make an investigatory stop of a person driving under the influence when the caller has a sufficient eyewitness basis of knowledge). Compare to ***Cook v. State***,159 So.3d 534 (Miss. 2015). ***Riley v. California***, 134 S.Ct. 2473 (2014) (police may not search an arrested individual's cell phone data without a warrant). ***Fernandez v. California***, 134 S.Ct. 1126 (2014) (An objecting occupant does not have a 4th Amendment right to suspend all searches of a residence when another occupant consents to the search. The objecting occupant must be present at the residence to assert a 4th Amendment right).

B. The Fifth Amendment

The Fifth Amendment provides protection against compelled self-incrimination, and a prohibition against Double Jeopardy. The ***Miranda*** warnings are court-initiated doctrines and not directly in the Constitution. The right to a grand jury indictment has not been made applicable to the states via the 14th Amendment. Not all states utilize the grand jury for indictment of criminals. In general, the Fifth Amendment covers post-arrest police activity, whereas the Fourth Amendment covers pre-arrest concerns.

1) Self-incrimination. The 5th amendment prohibits the government from compelling self-incriminating testimony. Any natural person may assert the privilege. The privilege is personal, and so may be asserted by the defendant, witnesses, or party only if the answer to the question might tend to incriminate him. The privilege only applies to testimonial evidence. The State can compel such physical evidence as blood samples, ***Schmerber v. California***, 384 U.S. 757 (1966), or handwriting exemplars. ***Gilbert v. California***, 388 U.S. 263 (1967).

2) ***Miranda v. Arizona***, 384 U.S. 436 (1966). The Court held that both inculpatory and exculpatory statements made *in response to interrogation* by a defendant *in police custody* will be admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination prior to questioning by police, and that the defendant not only understood these rights, but voluntarily waived them.

3) Interrogation. Any words or actions on the part of the police, other than those which normally attend to arrest and custody, that police should know are reasonably likely to elicit an incriminating response from the suspect. ***Rhode Island v. Innis***, 446 US 291(1980).

4) Voluntariness. Totality of the circumstances is again the test to determine if a confession in voluntary. ***Arizona v. Fulminante***, 499 U.S. 279 (1991). Any coercion must be by law enforcement or state actors. ***Colorado v. Connelly***, 479 U.S. 157 (1986).

5) Custody. Generally, arrest equals custody. ***Orozco v. Texas***, 394 U.S. 324 (1969). In ***Thompson v. Keohane***, 516

US 99 (1995), the Court announced a two part-test to determine if a person was in custody for *Miranda* purposes. (1) what were the circumstances surrounding the interrogation (totality of the circumstances); and, (2) given the circumstances, would a reasonable person have felt he was not at liberty to terminate the interrogation and leave.

6) Request for Counsel. ***Miranda*** did not grant suspects a right to have an attorney immediately present when they asked for one – only a right to counsel in the future and to cut off questioning until counsel is present. When a defendant invokes the right to counsel, this is a *per se* bar to further police-initiated interrogation. ***Edwards v. Arizona***, 451 U.S. 477 (1981). Re-interrogation is only permissible once defendant's counsel has been made available to him, or he himself initiates further communication, exchanges, or conversations with the police. There is a public safety exception to interrogation with *Miranda* warnings. ***New York v. Quarles***, 467 U.S. 649 (1984).¶

7) Use of a statement in violation of ***Miranda*** for impeachment is limited. Involuntary (coerced) confessions cannot be used to impeach. ***Mincey v. Arizona***, 437 U.S. 385 (1978). When a defendant is given warnings and refuses to make a statement, his silence can not be used to later impeach his testimony at trial. ***Doyle v. Ohio***, 426 U.S. 610 (1976). Any otherwise voluntary confession taken in violation of ***Miranda*** can be used for later impeachment. ***Harris v. New York***, 401 US 222 (1971).

8) The Double Jeopardy Clause prohibits state and federal governments from prosecuting individuals for the same crime on more than one occasion, or imposing more than one punishment for a single offense. In ***Blockburger v. United States***, 284 U.S. 299 (1932), the Court held that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Double jeopardy attaches at the empaneling and swearing of the jury. ***Crist v. Bretz***, 437 U.S. 28 (1978). In bench trials, jeopardy attaches when the first witness is sworn.

C. The Sixth Amendment

The 6th Amendment contains specific protections for people accused of crimes.

1)The Speedy Trial Clause guarantees that a defendant must be tried quickly when charged with a crime. The clock begins when a defendant is arrested. ***Barker v. Wingo***, 407 U.S. 514 (1972), provides the balancing test to determine if a defendant was prejudiced by an unreasonable delay in his trial.

(a) length of the delay
(b) reason for the delay
(c) whether the defendant asserted his right to a speedy trial
(d) whether the defendant was prejudiced by the delay

2) The right to a public trial is a right a defendant can not waive. The press and public have a right under the 1st Amendment to attend the trial, even if the defense and prosecution want it closed. A judge can only close a trial after a finding that closure is necessary to a fair trial. ***Richmond Newspapers v. Virginia***, 448 U.S. 555 (1980).

3) The right to trial by jury only applies to serious offenses. An offense is serious if the result can be imprisonment for more than 6 months. ***Blanton v. City of North Las Vegas***, 489 U.S. 538 (1989). Therer is also no constitutional right to a jury of 12 or an unanimous verdict. Those rules are left to the States. A defendant is entitled to a jury representing a cross-section of the community. Jurors can not be discriminated against based on race or gender. ***Batson v. Kentucky***, 476 U.S. 79 (1989).

4) The arraignment clause requires that a defendant is charged with a crime, he must be fully informed of the nature and cause of the accusation against him.

5) Confrontation. The 6th Amendment grants the defendant the right to confront the witnesses against him. ***Crawford v. Washington***, 541 U.S. 36 (2004). A defendant is entitled to a face-to-face encounter with the witness. However, the right is not absolute. If preventing such confrontation serves an important public purpose (such as protecting a child witness), there may be no constitutional violation. ***Maryland v. Craig***, 497 U.S. 836 (1990). The judge may also remove a

disruptive defendant. ***Illinois v. Allen***, 397 U.S. 337 (1970).

6) The 6th Amendment's Compulsory Process Clause guarantees two primary things. First, a defendant can call witnesses in his behalf . Second, that the court will subpoena the witnesses if they refuse to come to trial to testify. This protection is necessary to guard against unfair or unjust accusations in court. Without the ability to call witnesses in one's behalf, false accusations might seem truthful and a false conviction could occur.

7) The 6th Amendment right to counsel is a little different than the 5th Amendment right. A defendant is guaranteed a lawyer to assist him if charged with a crime. A defendant can have a court appointed attorney, paid for at the public's expense, if the defendant can not afford one. "Assistance" of counsel has also been interpreted to mean "effective assistance" of counsel. ***Strickland v. Washington***, 466 U.S. 668 (1984). The right applies at all ***critical stages*** of a criminal prosecution. Generally, the federal right applies at initial appearance. ***Rothgery v. Gillespie County, TX***, 554 U.S. 191. An accused has a right to counsel for misdemeanors if jail time (even suspended time) can be imposed. ***Shelton v. Alabama***, 535 U.S. 654 (2002). The 5th Amendment right to counsel applies in precharge custodial interrogations.

8) Pro Se Representation. A defendant has a right to waive counsel and to defend himself at trial. ***Faretta v. California***, 422 U.S. 806 (1975). The court can appoint an attorney to be a "stand-by" counsel to assist in the defense. ***McKaskle v. Wiggins***, 465 U.S. 168 (1984). A defendant has no federal right to represent himself on appeal. ***Martinez v. Court of Appeal***, 528 U.S. 152 (2000).

9) The 6th Amendment right to counsel is "offense specific." In other words, if a defendant makes a 6th Amendment request for counsel for one charge, he must make another request if he is subsequently charged with separate, unrelated charge. He can also be questioned without counsel concerning the unrelated charge. ***Illinois v. Perkins***, 496 U.S. 292 (1990).

VI. MISSISSIPPI CONSTITUTIONAL HISTORY

A. Mississippi's first Constitution was adopted in 1817. It created three branches of government similar to the national government. Judges were

elected by the legislature to serve on good behavior until age 65. In 1832 a more democratic constitution was adopted. All major public officials were to be elected. Property qualifications to vote and hold office were abolished. People could not longer be jailed for failure to pay a debt. Any white male resident of the state over age 21 could vote.

B. After the Civil War, the state adopted a new constitution during Reconstruction, which was ratified by voters on December 1, 1869. Known as the Constitution of 1868, it formally abolished slavery, and was similar to state constitutions of northern states. All citizens were given equal civil and political rights. Citizens were given the rights of trial by jury and freedom of speech, press, assembly, and petition. There was no property qualifications for jury service, holding office, or voting. It even established a system of free public education.

C. The Mississippi Constitution of 1890. However, there was much discontent with the 1868 constitution, as it was viewed as something forced on the state during Reconstruction. During a new constitutional convention, key provisions of the 1868 constitution were removed, such as the allowing blacks to sit on juries and the right of all citizens to travel on public conveyances. Although the new constitution allowed all adult males to vote (except idiots, the insane, and Indians), several restrictions were imposed. A voter had to register 4 months before an election and must not have committed a major crime. A poll tax was also imposed, which had to be paid two years in advance. The Constitution of 1890 was never placed before the voters for ratification. It was simply deemed adopted.

VII. THE MISSISSIPPI CONSTITUTION OF 1890

A. Fortunately, since 1890, the state constitution has been amended so frequently that it bears little resemblance to its original forms and purposes. Today, the Mississippi Constitution has a preamble and 15 Articles. Article 3 has the State's version of a Bill of Rights. The following sections of Article 3 have a significant impact on justice and municipal courts in criminal matters:

Section 14: Due process. No person shall be deprived of life, liberty, or property except by due process of law.

Section 21: Writ of habeas corpus. The privilege of the writ of habeas corpus shall not be suspended, unless when in the case of rebellion or invasion, the public safety may require it, nor ever without the authority of the legislature.

Section 22: Double jeopardy. No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.

Section 23: Searches and seizures. The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

Section 24. Open courts. All courts shall be open...[remedies for injury omitted]

Section 26: Rights of accused. In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial. [State Grand Jury provisions omitted].

Section 28: Cruel or unusual punishment prohibited. Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed.

Section 29: Excessive bail prohibited; Revocation or denial of Bail. (1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.

(2) If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term "felony" means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection.

(3) In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offense would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.

(4) In any case where bail is denied before conviction, the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. The provisions of this subsection (4) do not apply to bail revocation orders.

Section 30: Imprisonment for debt. There shall be no imprisonment for debt.

VIII. MAJOR PROVISIONS WHERE MISSISSIPPI PROVIDES GREATER FEDERAL CONSTITUTIONAL PROTECTIONS.

The Mississippi Constitution "is to be liberally construed in favor of the citizen." ***State v. Bates***, 192 So. 832, 836 (1940). There is a presumption that protections in the federal and state constitutions are similar.

> ...[We] do not suggest that the Mississippi Constitution must always be interpreted identically to the United States Constitution. It is a basic principle of our Federal Republic that a sovereign state may place greater restrictions on the exercise of its own power than does the Federal Constitution. See ***Oregon v. Hass***, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 575-76 (1975).

McCrory v. State, 342 So. 2d 897, 900 (Miss. 1977).

A. Right to Counsel in General. The federal right to counsel attaches at the accusatory stage (generally initial appearance). The Mississippi Supreme Court has held that for purposes of the state constitutional right to counsel, the advent of the accusatory stage is defined by reference to state law. Miss. Code Ann. §99–1–7 (1972) "provides for commencement of prosecution as occurring when a warrant is issued as well as 'by binding over or recognizing the offender to compel his appearance to answer the offense[.']" ***Howell v. State***, No. 2013-CA-01027-SCT (¶ 35) (Miss. Oct. 9, 2014), *citing* ***Atkinson v. State***, 132 Miss. 377, 96 So. 310, 311–12 (1923). Even if the right to

counsel has not attached by warrant, the right to counsel is "surely available" at the time the initial appearance "ought to have been held." ***Page v. State***, 495 So. 2d 436, 439 (Miss. 1986).

B. Search and Seizure. Besides the well-know standards under the 4th Amendment, Article 3, Section 23 of the Mississippi Constitution extends greater protections of an individual's reasonable expectation of privacy than federal law. Section 23 is "strictly construed against the state." ***Scott v. State***, 266 So.2d 567, 569–70 (Miss.1972). This protection extends to a rented bedroom. "After learning of his separate occupancy of the bedroom prior to searching it, the officers must have either obtained a new warrant for his separate room or searched the room pursuant to a valid exception to Section 23's warrant requirement." ***Graves v. State***, 708 So. 2d 858, 861-62 (Miss. 1997). The Court uses a two-part inquiry to determine the reasonableness of a search and seizure: "(1) whether the officer's action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place." ***Eaddy v. State***, 63 So. 3d 1209, 1212-13 (Miss. 2011), *citing* ***Gonzales v. State***, 963 So.2d 1138, 1141 (Miss. 2007). The "good faith" exception to the exclusionary rule should apply only in unique circumstances, such as where the officer's reliance on an invalidated search warrant was "objectively reasonable." ***Eaddy*** at 63 So.3d at 1214-15, (¶ 22), *citing* ***White v. State***, 842 So.2d 565, 577 (Miss.2003).

C. Interrogations. Under the federal constitution, when an accused mentions counsel, law enforcement officers do not have to stop questioning unless the accused makes an unambiguous request for a lawyer. ***Davis v. United State***, 512 U.S. 452 (1994). However, under the Mississippi Constitution, when a suspect mentions a lawyer, police must clarify the comment to make sure the accused does not want counsel before continuing with any questions. ***Downey v. State***, 144 So.3d 146 (Miss. 2014). "*Davis* does not require Mississippi to follow the minimum standard that the federal government has set for itself. We are empowered by our state constitution to exceed federal minimum standards of constitutionality and more strictly enforce the right to counsel during custodial interrogations." ***Id***. at ¶9. ***But see, Franklin v. State***, No. 2013-KA-01880-SCT (Miss. July 23, 2015) (plurality opinion holding that "Never has this Court held that the Mississippi Constitution provides greater protection than the U.S. Constitution to criminal suspects who invoke the right of counsel during custodial interrogations.").

D. Pro Se Counsel. Although the federal constitution grants the right to represent oneself, (*see* ***Faretta v. California***, 422 U.S. 806, 819-20 (1975)), there is no federal right to self-representation on appeal. ***Martinez v. Court of Appeal of California***, 528 U.S. 152, 163 (2000). Under Article 3, Section 26, if a defendant (or appellant) is mentally competent, has a right to

discharge his attorneys and represent himself on appeal. ***Grim v. State***, 102 So. 3d 1073, 1076-77 (¶4-5) (Miss. 2012). As Section 26 grants the "right to be heard by himself or counsel, or both," an indigent appellant has the right to have appointed counsel on appeal, as well as file a pro se supplemental brief on issues not raised by counsel. ***Barber v. State***, 143 So. 3d 586, 589 n.1 (Miss. Ct. App. 2013). See also MRAP Rule 28(b).

E. Imprisonment for Debt. The federal constitution does not directly address imprisonment for debt. However, the Due Process Clause of the 14th Amendment has been construed to prohibit a court imprisoning a defendant for inability to pay a court-ordered fine. ***Bearden v. Georgia***, 461 U.S. 660 (1983). Due process also prohibits indirect contempt to pay child support payments without a hearing to determine ability to pay. See generally, ***Hicks v. Feiock***, 485 U.S. 624 (1988). To be a debt within the meaning of the Mississippi Constitution, the obligation existing between the parties must be either purely contractual or arise from some legal liability growing out of the debtor's dealings with another. It does not extend to court ordered fines as part of the punishment of a crme. ***Ex parte Diggs***, 38 So. 730, 730 (1905). A county court judge was recently sanctioned for finding a civil litigant in contempt and jailing him for failure to pay a civil judgment in violation of Section 30. ***Mississippi Comm'n on Judicial Performance v. Patton***, 57 So. 3d 626, 630 (Miss. 2011).

IX. ADDITIONAL PROBLEM ISSUES REGARDING MUNICIPAL AND JUSTICE COURTS

A. Right to Counsel.

When a person shall be charged with an offense in municipal court punishable by confinement, the municipal judge, being satisfied that such person is an indigent person and is unable to employ counsel, *may, in the discretion of the court, appoint counsel* from the membership of The Mississippi Bar residing in his county who shall represent him.

Miss. Code. Ann. § 21-23-7(4) [emphasis added].

When any person shall be charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency, the court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, *may, in the discretion of the court,* appoint counsel to defend him.

Miss. Code. Ann. § 99-15-15 [emphasis added].

As stated above, the 6th Amendment guarantees the right to counsel in misdemeanors if a defendant is sentenced to jail, included a suspended jail

sentence. (See ***Alabama v. Shelton***, 535 U.S. 654 (2002)). Despite the language in §21-23-7, (§99-15-15 for other courts), a court **must** appoint counsel absent a knowing and voluntary waiver by the accused if he faces a jail sentence.

B. Trial in Absentia.

In criminal cases the presence of the prisoner may be waived (a) if the defendant is in custody and consenting thereto, or (b) is on recognizance or bail, has been arrested and escaped, or has been notified in writing by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or is in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment made final and sentence awarded as though such defendant were personally present in court.

Miss. Code. Ann. § 99-17-9

An accused's right to be present at every stage of his trial is guaranteed by the Sixth Amendment to the United States Constitution and Article 3, Section 26, of the Mississippi Constitution. This right may be waived based on a defendant's willful, voluntary, and deliberate absence from trial. ***Jay v. State***, 25 So. 3d 257, 264 (¶38) (Miss. 2009). If trying a defendant in absentia, evidence must still be presented to the court to prove guilt beyond a reasonable doubt. Even traffic tickets require the officer who wrote the ticket to be present. Op. Atty. Gen. No. 2001-0778, Arnold, Jan. 11, 2002.

C. Bail issues. Section 29 of the Mississippi Constitution prohibits municipal courts and justice courts from denying bail. "Of course, the defendant's propensity to flee is a proper consideration in setting the amount of the bail." Op.Atty.Gen. No. 94-0069, Ross, Feb. 16, 1994. However, be aware that excessive bail is considered tantamount to a denial of bail. ***Brown v. State***, 217 So.2d 521, 523 (Miss.1969). The statute allowing municipal courts does mention authority to deny bail. However, even if § 21-23-7 is constitutional, the denial of bail applies to nonbailable offenses only. A municipal judge is allowed "...to set the amount of bail or refuse bail and commit the accused to jail in cases not bailable."

1) While the setting of bail is within the trial court's discretion, the Mississippi Supreme Court has espoused factors which should be considered as guidelines when determining the amount of bail:

(1) Defendant's length of residence in the community;
(2) His employment status and history and his financial condition;
(3) His family ties and relationships;

(4) His reputation, character and mental condition;
(5) His prior criminal record, including any record of prior release on recognizance or on bail;
(6) The identity of responsible members of the community who would vouch for defendant's reliability;
(7) The nature of the offense charge and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of non-appearance; and
8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

Shook v. State, 511 So.2d 1386, 1387 (Miss.1987).

2) "A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional. ***Lee v. Lawson***, 375 So. 2d 1019, 1023 (Miss. 1979). Judicial officers must provide reasons, on the record, why alternative forms of release other than money bail would not adequately assure the defendant's presence at trial. ***Id***. at 1024. It is a judicial abuse of discretion to set bail in an amount designed to expedite the judicial process. See ***Clay v. State***, 757 So.2d 236 (Miss. 2000).

3) Cash bonds are currently under attack in several jurisdictions. Velda City, MO just entered a consent degree in federal court which prohibits the jailing of people in lieu of cash bail for municipal offenses. ***Varden v. City of Clanton, Alabama,*** was a case filed by Equal Justice Under Law in January of 2015, and agreed to reform its money bail practices. The DOJ filed a statement of interest in that case. Another ruling out of the federal court in Montgomery, AL, also declared unconstitutional the use of money bail to detain the indigent. The city of Moss Point, MS has also been targeted with a similar lawsuit.

D. Pay or Stay. Justice and municipal have been routinely jailing defendants for failure to be fines. Usually no counsel are present doing these hearing. No record is made on whether the defendants have the ability to pay. Such procedures are unconstitutional. Several recent lawsuits have been filed regarding this practice. Montgomery, AL just entered into a settlement agreement in federal court which prohibits the jailing of indigent defendants solely for failing to pay fines, requiring judges to make on-the-record determinations of indigency, and requiring the training of municipal prosecutors and public defenders on ***Bearden v. Georgia***. Cities in Louisiana

and Missouri have also been sued. It is our understanding the Jackson, MS is also being targeted.

X. CONCLUSION